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10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

12 LOI TRAN, Individually and on behalf of  
13 all others similarly situated

14 Plaintiff,

15 v.

16 THIRD AVENUE MANAGEMENT  
17 LLC, THIRD AVENUE TRUST, M.J.  
18 WHITMAN LLC, MARTIN J.  
19 WHITMAN, DAVID M. BARSE, JACK  
20 W. ABER, WILLIAM E. CHAPMAN II,  
21 LUCINDA FRANKS, EDWARD J.  
22 KAIER, MARVIN MOSER, ERIC  
23 RAKOWSKI, MARTIN SHUBIK,  
24 CHARLES C. WALDEN, VINCENT J.  
25 DUGAN, W. JAMES HALL III,  
26 MICHAEL BUONO, THOMAS  
27 LAPOINTE, NATHANIEL KIRK,  
28 EDWIN TAI, and JOSEPH ZALEWSKI,

Defendants.

No. 2:16-CV-00602-MWF-SS

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
OPPOSITION TO COMPETING  
MOTIONS FOR APPOINTMENT  
OF LEAD PLAINTIFF**

Date: May 2, 2016

Time: 10:00 am

Courtroom: Spring Street 1600  
– 16<sup>th</sup> Floor

Judge: Hon. Michael W.  
Fitzgerald

[Additional Dockets on Next Page]

1 INTER-MARKETING GROUP USA,  
2 INC., Individually and on behalf of all  
others similarly situated

No. 2:16-CV-00736-MWF-SS

3 Plaintiff,

4  
5 v.

6 THIRD AVENUE TRUST, THIRD  
7 AVENUE MANAGEMENT LLC, M.J.  
8 WHITMAN LLC, MARTIN J.  
9 WHITMAN, DAVID M. BARSE,  
10 VINCENT J. DUGAN, WILLIAM E.  
11 CHAPMAN, II, LUCINDA FRANKS,  
12 EDQARD J. KAIER, ERIC RAKOWSKI,  
MARTIN SHUBIK, CHARLES C.  
WALDEN and PATRICK  
REINKEMEYER,

13 Defendants.  
14

15 SCOTT MATTHEWS, Individually and  
16 on behalf of all others similarly situated

No. 2:16-CV-00770-MWF-SS

17 Plaintiff,

18 v.  
19

20 THIRD AVENUE MANAGEMENT  
21 LLC, THIRD AVENUE TRUST, M.J.  
22 WHITMAN LLC, MARTIN J.  
23 WHITMAN, DAVID M. BARSE, JACK  
24 W. ABER, WILLIAM E. CHAPMAN II,  
25 LUCINDA FRANKS, EDWARD J.  
26 KAIER, MARVIN MOSER, ERIC  
27 RAKOWSKI, MARTIN SHUBIK,  
28 CHARLES C. WALDEN, VINCENT J.  
DUGAN, W. JAMES HALL III,  
MICHAEL BUONO, THOMAS  
LAPOINTE, NATHANIEL KIRK,  
EDWIN TAI, and JOSEPH ZALEWSKI,

Defendants.

SUPRABHA BHAT, Individually and on  
behalf of all others similarly situated

Plaintiff,

v.

THIRD AVENUE MANAGEMENT  
LLC, THIRD AVENUE TRUST, M.J.  
WHITMAN LLC, MARTIN J.  
WHITMAN, DAVID M. BARSE, JACK  
W. ABER, WILLIAM E. CHAPMAN II,  
LUCINDA FRANKS, EDWARD J.  
KAIER, MARVIN MOSER, ERIC  
RAKOWSKI, MARTIN SHUBIK,  
CHARLES C. WALDEN, VINCENT J.  
DUGAN, W. JAMES HALL III,  
MICHAEL BUONO, THOMAS  
LAPOINTE, NATHANIEL KIRK,  
EDWIN TAI, and JOSEPH ZALEWSKI,

Defendants.

No. 2:16-CV-00904-MWF-SS

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18	15 U.S.C. § 78u-4 .....	<i>passim</i>
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1           Lead Plaintiff Movants Dr. Suprabha Bhat and Thomas McCall  
 2 (collectively the “Bhat Movants”) respectfully submit the following memorandum  
 3 of points and authorities in opposition to the competing motions for appointment  
 4 as lead plaintiff filed in the above-captioned actions, proposing that the Court  
 5 appoint the Bhat Movants as co-lead plaintiffs with IBEW Local No. 58 Sound &  
 6 Communication Division Retirement Plan (the “Retirement Plan”), the  
 7 institutional investor that has suffered the greatest loss in this litigation.<sup>1</sup>

8           While the Bhat Movants acknowledge that they do not necessarily have the  
 9 greatest loss of any lead plaintiff movant, they have suffered the largest loss of  
 10 any private investor movant of the Third Avenue Focused Credit Fund (“Third  
 11 Avenue” or the “Fund”) who *also satisfies the requirements of Rule 23*.  
 12 Accordingly, the Bhat Movants are the most qualified individual investor movants  
 13 seeking appointment as lead plaintiffs with the Retirement Plan.

14           The Court has full authority and discretion to appoint co-lead plaintiffs and  
 15 co-lead counsel to ensure adequate representation throughout all stages of this  
 16 case, consistent with the PSLRA. Here, there are significant benefits to the class  
 17 of having both institutional and individual investors serve as co-lead  
 18 representatives. Therefore, the Court should appoint the Bhat Movants as a co-  
 19 lead plaintiff and appoint Levi & Korsinsky LLP (“Levi & Korsinsky”) as co-lead  
 20

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21           <sup>1</sup> On April 11, 2016, the Court heard argument on Defendants Michael Buono, Vincent J.  
 22 Dugan, W. James Hall, II, M.H. Whitman LLC, Third Avenue Management, LLC, and Third  
 23 Avenue Trust’s motion to transfer the pending matter to the Southern District of New York  
 24 (Dkt. Entry No. 11). Consistent with its tentative ruling, the Court indicated at oral argument  
 25 that it would be granting that transfer and would not be proceeding with the hearing on the  
 26 competing motions for appointment, then scheduled for May 2, 2016. So as not to burden the  
 27 Court with unnecessary filings, given its stated ruling to transfer the matter to the Southern  
 28 District of New York prior to the May 2, 2016 hearing date, the Bhat Movants did not  
 electronically file the instant opposition on April 11, 2016, the last day to file opposing papers  
 pursuant to Local Rule 7-9. However, two competing movants did submit memoranda related  
 to their respective motions (Dkt. Entry No. 51, 52). The Bhat Movants have sought guidance  
 from the clerk of the Court on the effect of the Court’s ruling to the consolidation and lead  
 plaintiff briefing deadlines and, in an abundance of caution, they now file their instant  
 memorandum to avoid any undue prejudice.



counsel and Shepherd Finkelman Miller & Shah LLP (“SFMS”) as co-liaison counsel.

# **I. THE BHAT MOVANTS SHOULD BE APPOINTED CO-LEAD PLAINTIFF ALONGSIDE THE RETIREMENT PLAN**

## **A. The Bhat Movants Suffered Substantial Personal Losses**

The presumptive “most adequate plaintiff” is the class member with the largest financial interest in the litigation. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb); *see also Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1134 (C.D. Cal. 1999); *Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 663 (C.D. Cal. 2005). Although the PSLRA does not mandate a particular method for calculating financial interest, courts have considered the following factors to aid in their determination: (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended; and (4) the approximate losses suffered. *Perlmutter v. Intuitive Surgical, Inc.*, No. 10-CV-03451-LHK, 2011 U.S. Dist. LEXIS 16813, at \*24-\*25 (N.D. Cal. Feb. 15, 2011); *Mulligan v. Impax Labs., Inc.*, No. C-13-1037 EMC, 2013 U.S. Dist. LEXIS 93119 (N.D. Cal. July 2, 2013).

As demonstrated in the following chart, the Bhat Movants are the non-institutional movants with the second largest amount of shares purchased, net expenditures, and estimated losses.<sup>2</sup>

<b>Movant</b>	<b>Shares Purchased</b>	<b>Net Shares</b>	<b>Net Expenditures</b>	<b>Estimated Loss</b>
Retirement Plan	230,340.132	230,340.132	\$2,536,114.25	\$1,306,744.52
Bhat Movants	45,796.81	27,791	\$490,588.13	\$135,414.64
Third Avenue Investor Group (4 Individuals)	63,806	51,465	\$528,962.97	\$140,287.49
Stephen L. Craig	19,342.981	unknown <sup>3</sup>	\$198,000.00	\$93,676.86

<sup>2</sup> On April 11, 2016, an investor group composed of Robert Bates, Scott Matthew, and Chad S. Miller withdrew its motion for appointment as Lead Plaintiff. As such, this group has been omitted from the comparative loss chart.

<sup>3</sup> The schedule of transactions accompanying the certification of Mr. Craig appears to be a screenshot of his Vanguard account. *See* Ex. B to the Declaration of Solomon B. Cera in MEMORANDUM IN OPPOSITION TO COMPETING MOTIONS

As the above chart demonstrates, the Bhat Movants have suffered losses comparable to the other movants. While it is clear that the Retirement Plan is the movant with the greatest financial loss, it is beyond dispute that the Bhat Movants have suffered substantial losses and have a large financial interest in the resolution of this action. Moreover, as detailed more herein, the Bhat Movants are the only lead plaintiff movant that submitted a declaration detailing their plans to manage the Action. *See* Ex. F, G to the Declaration of Shannon L. Hopkins in Support of Motion for Suprabha Bhat and Thomas McCall for Appointment as Lead Plaintiffs, Approval of their Selection of Lead Counsel, and Consolidation of Related Actions (the “Hopkins Decl.”) (Dkt. Entry No. 29). Accordingly, the Bhat Movants have suffered substantial losses as private investors of Third Avenue and are the most qualified individual investor movants seeking appointment as co-lead plaintiffs with the Retirement Plan.

**B. The Court Has the Discretion to Appoint Individual and Institutional Investors as Co-Lead Plaintiffs to Benefit the Class**

The PSLRA permits the appointment of more than one person or entity as lead plaintiff. *See* 15 U.S.C. 78u-4(a)(3)(B)(i) (directing the Court to “appoint as lead plaintiff the member *or members* of the purported plaintiff class.”) (emphasis added). The Court therefore has the authority to appoint the “member or members of the purported plaintiff class that the [C]ourt determines to be most capable of adequately representing the interests of class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i); *In re Tyco Int’l, Ltd. Secs. Litig.*, 2000 U.S. Dist. LEXIS 13390, at \*38 (D.N.H. 2000) (appointing three lead plaintiffs and noting that “while a group comprised of many small shareholders might be unwieldy and lack the proper incentive to serve as an effective lead plaintiff ... a group that consists of a small

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support of the Motion of Stephen L. Craig for (I) Appointment as Lead Plaintiff; and (II) Approval of Selection of Lead Counsel (Dkt. Entry No. 39). However, it is unclear as to whether these transactions represent *all* transactions in TFCIX or only purchases, as there appears to be a filter applied showing only those transactions for “Transaction types: Buy.”

1 number of large shareholders should be capable of managing this litigation and  
2 providing direction to class counsel.”).

3 Indeed, courts often appoint co-lead plaintiffs comprised of institutions and  
4 individual investors to ensure that all class members are properly represented and  
5 that the potential recovery for all class members is maximized. *See, e.g., In re*  
6 *Oxford Health Plans Inc., Sec. Litig.*, 182 F.R.D. 42 (S.D.N.Y. 1998) (appointing  
7 both institutional investors and individual investors as lead plaintiff “ensures that  
8 the interests of all class members will be adequately represented in the prosecution  
9 of the action and in the negotiation and approval of a fair settlement, and that the  
10 settlement process will not be distorted by the differing aims of differently  
11 situated claimants.”); *Yousefi v. Lockheed Martin Corp.*, 70 F. Supp. 2d 1061,  
12 1071 (C.D. Cal. 1999) (“The Court also finds that with the appointment of one  
13 lead plaintiff who is an individual private investor and one lead plaintiff that is an  
14 institutional investor, the lead plaintiffs will represent a broader range of  
15 shareholder interests than if the Court appointed an individual or an institutional  
16 investor alone.”).

17 In addition to being the non-institutional investors with the largest financial  
18 interest and a detailed management plan, the Bhat Movants meet the requirements  
19 of Rule 23 and will provide a significant benefit to the Class if appointed. *See*  
20 *Bhat Movants’ Opening Brief* (Dkt. Entry No. 29) at 7-9.

### 21 **C. The Class Will Benefit From the Appointment of Individual and** 22 **Institutional Investors as Co-Lead Plaintiffs**

23 The Bhat Movants submit that the Class will benefit most from the  
24 combined leadership of both an Institutional and Individual investor for the  
25 following reason. **First**, appointment of both institutional and individual investors  
26 with substantial losses protects the class from potential class certification issues,  
27 including avoiding a conflict between institutional and individual investors, and  
28 provides strategic flexibility in litigating the action. *See Malasky v.*  
*IAC/Interactive Corp.*, 2004 U.S. Dist. LEXIS 25832, at \*14 (S.D.N.Y. 2004)

(Finding that an institution/individual co-lead plaintiff structure would protect the interests of the class at class certification in the event one plaintiff later “drops out of the action.”); *In re Lucent Techs., Inc. Sec. Litig.*, 221 F. Supp. 2d 472, 483 (D.N.J. 2001) (finding that appointing a co-lead plaintiff would provide “additional representation [that] may benefit the class and provide flexibility, if needed, in the future”); *Johnson v. Pozen Inc.*, No. 1:07CV599, 2008 WL 474334, at \*2 (M.D.N.C. Feb. 15, 2008) (“[A]n institution/individual Co-Lead Plaintiff structure will provide a diversity of representation and also protect the interests of the class at class certification in the event that either Rodriguez or the Pension Fund later leaves the action for whatever reason.”) (citing cases).

Notably, the risks associated with appointing a sole lead plaintiff who later withdraws are not merely hypothetical. *See, e.g., In re Neopharm, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 5814, at \*9-\*10 (N.D. Ill. 2004) (discussing the “delay” and “uncertainty” caused by a sole lead plaintiff’s withdrawal); *see also Order on Pending Motions, In re HealthSouth Sec. Litig.*, CV-03-BE-1500-S (N.D. Ala. Dec. 1, 2004) (holding that withdrawal of lead plaintiff “necessitates the re-opening of the process for the appointment of lead plaintiff as mandated by the PSLRA”); *Reitan v. China Mobile Games & Entm't Grp., Ltd*, 68 F. Supp. 3d 390, 398 n.3 (S.D.N.Y. 2014) (“In those cases where a lead plaintiff was appointed and later withdrew...the lead plaintiff process is essentially restarted.”)

**Second**, appointing both types of investors as co-lead counsel ensures that counsel are overseen by investors with unique perspectives, which fully represent the interests of the entire class. *See Laborers Local 1298 Pension Fund v. Campbell Soup Co.*, No. CIV. A. 00-152 (JEI), 2000 WL 486956, at \*3 (D.N.J. Apr. 24, 2000) (“It is the intention of the Court to appoint DeValle, Green and the Treasurer of the State of Connecticut as co-lead plaintiffs pursuant to the PSLRA. Connecticut has the largest financial interest in the suit, and the interest of DeValle and Green, combined, is the second largest. The Court also considers it

1 desirable to have both an institutional investor, like Connecticut, and individual  
 2 investors, like DeValle and Green, included as lead plaintiffs since each may bring  
 3 a unique perspective to the litigation.”).

4 The benefit of diverse and fulsome representation of perspectives has been  
 5 repeatedly recognized by courts within the Ninth Circuit and elsewhere. *See e.g.*,  
 6 *Yousefi v. Lockheed Martin Corp.*, 70 F. Supp.2d at 1072 (appointing an  
 7 individual and institutional investor to serve as co-lead plaintiffs noting “lead  
 8 plaintiffs will represent a broader range of shareholder interests than if the Court  
 9 appointed an individual or an institutional investor alone”); *In re Peregrine Sys.*  
 10 *Sec. Litig.*, No. 02cv870-J (RBB), 2002 U.S. Dist. LEXIS 27690, at \*49-50 (S.D.  
 11 Cal. Oct. 9, 2002) (“[A]ppointment of co-lead plaintiffs will better represent the  
 12 class members’ varying and perhaps conflicting interests.”); *Weisz v. Calpine*  
 13 *Corp.*, 2002 U.S. Dist. LEXIS 27831, 2002 WL 32818827, at \*8 (N.D. Cal. Aug.  
 14 19, 2002) (“The Court finds that appointing both an institutional and an individual  
 15 investor to serve as co-lead plaintiffs will ensure that all class members will  
 16 adequately be represented in the prosecution of this action”).<sup>4</sup>

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17  
 18 <sup>4</sup> *See also*, *In re Oxford Health Plans* 182 F.R.D. at 45 (Granting the motions of two  
 19 institutional investors and a group of major investors to be appointed co-lead plaintiffs to better  
 20 provide “the proposed class with the substantial benefits of joint decision-making and joint  
 21 funding” because co-appointment is consistent with the language of the language and purpose of  
 22 the PSLRA and remarking that when a lead plaintiff, as fiduciary for the class, drops out, the  
 23 settlement prospects grow adversely dim for the remaining class members); *Laborers Local*  
 24 *1298 Pension Fund*, No. CIV. A. 00-152 (JEI), 2000 WL 486956 at \*3 (appointing three  
 25 separate movants as co-lead plaintiffs and anticipating that each party would bring a “unique  
 26 perspective” to the litigation); *Bell v. Ascendant Solutions, Inc.*, No. Civ. A. 3:01-CV-0166,  
 27 2002 WL 638571, at \*5 (N.D. Tex. Apr. 17, 2002) (observing that the inclusion of an  
 28 institutional investor with two individual investors “improves diversity of experience” for the  
 class); *In re Cable & Wireless, PLC Securities Litigation*, 217 F.R.D. 372, 376 (E.D.Va. 2003)  
 (exercising discretion in appointing an institutional investor as co-lead plaintiff with an  
 individual investor and stating that the appointment of an individual investor and an institutional  
 investor “will ensure that all class members will be adequately represented in this action”);  
*Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 229 F.R.D. 395,  
 420 (S.D.N.Y. 2004) (noting that a co-lead plaintiff structure will “help to ensure that adequate  
 resources and experience are available to the prospective class in the prosecution” of the class  
 action); *Tice v. NovaStar Fin., Inc.*, Nos. 04-0330-CV-W-ODS, 2004 U.S. Dist. LEXIS 16800,  
 at \*25 n.7 (W.D. Mo. Aug. 23, 2004) (“In addition to being the non-institutional investors with

1 In circumstances similar to those here, the court in *Freudenberg v. E\*Trade*  
 2 *Fin. Corp.*, 2008 U.S. Dist. LEXIS 62767, at \*3 (S.D.N.Y. July 16, 2008)  
 3 appointed as co-lead plaintiffs the individual movant and the institutional movant  
 4 with the largest losses and their respective selection of counsel as co-lead counsel.  
 5 Specifically, in *E\*Trade* the court appointed the individual movant with the  
 6 largest loss along with the institutional movant with the largest loss, despite that  
 7 the four competing institutional movants had losses ranging from 21 to 273 times  
 8 more than the estimated loss of the individual movant. In so holding, the court  
 9 expressly recognized the benefit of appointing both an institution and an  
 10 individual as co-lead plaintiffs:

11 Although the other movants have failed to establish any respect in  
 12 which KSG's interests are not aligned with the other putative class  
 13 members, ***on the possibility that conflicts do ultimately arise, the***  
 14 ***interests of the class can be protected by the appointment of a co-***  
***lead plaintiff.*** (Emphasis Added.)

15 \*\*\*

16 This benefit is particularly cognizable here, as a significant percentage of  
 17 Third Avenue is held by individual investors. This factor further supports the Bhat  
 18 Movants appointment as the non-institutional investors with the largest financial  
 19

20 the largest financial interest, the Daniels meet the requirements of Rule 23. Appointing co-lead  
 21 plaintiffs will ensure a broader, more diverse representation of the class, thereby protecting the  
 22 various interests of its members.”); *Dolan v. Axis Capital Holdings Ltd.*, 2005 U.S. Dist. LEXIS  
 23 6538, at \*13-16 (S.D.N.Y. Apr. 13, 2005) (Co-lead plaintiffs “will be able to pool financial  
 24 resources, knowledge and experiences, and may also reap the ‘benefits of joint decision-  
 25 making’ when pressed with difficult choices. Moreover, a co-lead structure will provide  
 26 flexibility and stability to the class, especially if either party drops out of the action or  
 27 compromises the class in some other fashion.”) (internal citation omitted); *Plumbers &*  
 28 *Pipefitters Local 51 Pension Fund v. First BanCorp.*, 409 F. Supp. 2d 482, 483 (S.D.N.Y. 2006)  
 (appointing two individual investors and an institutional investor that “could collectively fulfill  
 the functions of lead plaintiff in a fair, adequate, and effective manner”); *Johnson* 2008 U.S.  
 Dist. LEXIS 12004, at \*6-7 (“[T]he appointment of one Lead Plaintiff who is an individual  
 private investor and one Lead Plaintiff that is an institutional investor will ensure that a broader  
 range of shareholder interests will be represented than if the court appointed an individual or an  
 institutional investor alone.”)



1 interest and a detailed management plan. *In re Oxford Health Plans* 182 F.R.D. at  
 2 50 (“The rebuttable presumption created by the PSLRA which favors the plaintiff  
 3 with the largest financial interest was not intended to obviate the principle of  
 4 providing the class with the most adequate representation.”). The losses suffered  
 5 by the Bhat Movants are more identical to the losses suffered by other private  
 6 investors in Third Avenue, and different from the losses suffered by institutional  
 7 investors which can more readily absorb and offset losses. *Id.* at 46 (“While the  
 8 legislative history of the PSLRA suggests a desire that institutional investors be  
 9 preferred as class representatives, not all institutional investors are similarly  
 10 situated.”); *Yousefi v. Lockheed Martin Corp.*, 70 F. Supp. 2d at 1071 (“The Court  
 11 also finds that with the appointment of one lead plaintiff who is an individual  
 12 private investor and one lead plaintiff that is an institutional investor, the lead  
 13 plaintiffs will represent a broader range of shareholder interests than if the Court  
 14 appointed an individual or an institutional investor alone.”) The individual  
 15 investors of Third Avenue deserve to have their unique interests represented by  
 16 Class leadership.

17 Here, the Bhat Movants and the Retirement Plan would be a small, cohesive  
 18 group comprised to ensure that the class will receive the broadest representation  
 19 possible. *See Bell v. Ascendent Solutions, Inc.*, 2002 U.S. Dist. LEXIS 6850, at  
 20 \*16-\*17 (N.D. Tex. 2002) (Solis, J.) (reasoning that the inclusion of an  
 21 institutional investor with two individual investors “improves diversity of  
 22 experience” for the class); *In re Versata, Inc.*, 2001 U.S. Dist. LEXIS 24270, at  
 23 \*26 (N.D. Cal. 2001) (“The group possesses both sophistication and business  
 24 knowledge, as well as substantial individual losses which adds meaningful  
 25 incentive for a vigorous prosecution of the action.”). The Bhat Movants’ efforts to  
 26 represent a broader range of shareholder interests should be rewarded, not  
 27 undermined. *See id.*

**D. The Other Individual Movants Are Inadequate And Should Not Be Appointed Co-Lead Plaintiffs**

The Bhat Movants are the only adequate private investors seeking appointment as co-lead plaintiff with the Retirement Plan. There are two other individual investors currently seeking appointment as lead plaintiff or co-lead plaintiff: (i) Third Avenue Investor Group (4 individuals); and (ii) Stephen L. Craig.

The Third Avenue Investor Group is inadequate to serve as lead plaintiff or co-lead plaintiff because it is not a cohesive group, as mandated by the PSLRA and has failed to submit any plan to the Court detailing how it anticipates managing the Action. *See e.g., In re Level 3 Commc'ns*, No. 09-CV-00200-PAB-CBS, 2009 U.S. Dist. LEXIS 44706, at \*12 (D. Colo. May 4, 2009) (refusing to appoint a group where the joint declaration presented little evidence of “mechanisms for cooperation, dispute resolution, or communication among the group members and counsel”); *In re Eichenholtz*, No. C 07-06140 MHP, 2008 U.S. Dist. LEXIS 64633, 2008 WL 3925289, at \*9 (N.D. Cal. Aug. 22, 2008) (refusing to appoint a group that did not show how they would coordinate their efforts in the litigation).<sup>5</sup> Accordingly, it is not a cohesive group under the PSLRA and must be rejected.

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<sup>5</sup> *See also, Tsirekidze v. Syntax-Brilliant Corp.*, 2008 U.S. Dist. LEXIS 118562, 2008 WL 942273, at \*4 (D. Ariz. Apr. 7, 2008) (refusing to appoint a group as lead plaintiff that lacked any evidence of cohesiveness); *In re Gemstar-TV Guide Int'l, Inc. Sec. Litig.*, 209 F.R.D. 447, 451-452 (C.D. Cal. 2002) (recognizing the uniform view that courts find it inappropriate to appoint a group as lead plaintiff where its members do not have a pre-existing relationship or provide any explanation for the formation of the group); *Niederklein v. PCS Edventures!.com, Inc.*, No. 1:10-cv-00479-EJL-CWD, 2011 U.S. Dist. LEXIS 18247, at \*20-21 (D. Idaho Feb. 24, 2011) (“To remain consistent with the purposes of the PSLRA’s lead plaintiff provisions, the Court concludes that a pre-existing relationship or evidence of cohesion between or among members of the group seeking appointment as lead plaintiff is essential...Instead of explaining how the members of the Padgett Group are prepared to work together to manage this litigation on behalf of the proposed class, the Padgett Group has submitted merely boilerplate certifications discussing the stock purchases and alleged losses for the group’s two members... Here, the record before the Court fails to establish that the Padgett Group is a proper group for lead plaintiff appointment.”)



1 By comparison, courts have found that groups of two individuals with a  
 2 detailed management plan were a cohesive group. *See e.g., Miami Police Relief &*  
 3 *Pension Fund v. Fusion-io, Inc.*, No. 13-CV-05368-LHK, 2014 U.S. Dist. LEXIS  
 4 80141, at \*20-21 (N.D. Cal. June 10, 2014) (“In support of its motion for  
 5 appointment as lead plaintiff, FIG has submitted declarations from each of the two  
 6 individuals comprising FIG professing the readiness and willingness to serve as a  
 7 representative party on behalf of the class. They also claim they will work  
 8 cooperatively together to direct and supervise the activities of counsel to best  
 9 vindicate the interests of all shareholders and to vigorously prosecute the case.  
 10 Additionally, they have been in contact to discuss how information will be shared  
 11 and how the litigation will be managed on a day-to-day basis. Courts have found  
 12 that such joint declarations are demonstrative of a movant group's adequacy as  
 13 lead plaintiff.”)<sup>6</sup> Moreover, the Bhat Movants have suffered greater losses on an  
 14 individual basis than any individual investor in the Third Avenue Investor Group.

15 As such, the Third Avenue Investor Group should not be appointed lead  
 16 plaintiff or co-lead plaintiff because, *inter alia*: (i) its size is unmanageable, (ii) it  
 17 has failed to submit a management plan to the Court, and (iii) it has not suffered  
 18 greater losses than the Bhat Movants on an individual basis.

19 Similarly, Stephen L. Craig is inadequate to serve as lead plaintiff or co-  
 20 lead plaintiff because he has misrepresented his losses in Third Avenue securities  
 21 to this Court. In his memorandum in support of his appointment as lead plaintiff,  
 22 Craig represented that his estimated loss was approximately \$198,000, as based on  
 23

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24  
 25 <sup>6</sup> *See also, Bruce v. Suntech Power Holdings Co., Ltd.*, No. CV 12-04061 RS, 2012 U.S. Dist.  
 26 LEXIS 167702, at \*9-10 (N.D. Cal. Nov. 13, 2012) (appointing as lead plaintiff a group of  
 27 investors that submitted a joint declaration “attesting that each is knowledgeable about the  
 28 litigation, that they are working together, and that they are committed to protecting the interests  
 of the Class.”); *McCracken v. Edwards Lifesciences Corp.*, No. 8:13-CV-1463, 2014 U.S. Dist.  
 LEXIS 2147, at \*12-17 (C.D. Cal. Jan. 8, 2014) (appointing as lead plaintiff a group of  
 investors that submitted a joint declaration describing procedures for overseeing litigation as  
 lead plaintiff).

his net expenditures of approximately \$198,000. This calculation, using net expenditures as the basis for estimated loss, is plainly contrary to the procedure for calculating loss mandated by the PSLRA which calls for the application of the mean trading price during the “90 day look back” period for determining damages. *See* 15 U.S.C. § 78u-4(e). Then, in a subsequent footnote in his memorandum in support his appointment as lead plaintiff, Craig represented that his losses were approximately \$102,000, based on the closing price of Third Avenue on March 29, 2016. This calculation, using a look back date after the Class Period, is again plainly contrary to the procedure for calculating loss mandated by the PSLRA. *Id.* The multiple misrepresentations of his losses to the Court inflated his estimated loss by \$104,323.14 (based on the incorrect estimation of \$198,000) or \$8,323.14 (based on the incorrect calculation of \$102,000). Moreover, as discussed above, it is unclear whether Mr. Criag’s transactions represent *all* of his transactions in TFCIX or only purchases, as there appears to be a filter applied showing only those transactions for “Transaction types: Buy.” Craig’s demonstrable ignorance at best, or willful disregard at worst, for the procedures plainly mandated by the PSLRA render him woefully inadequate.

## II. THE BHAT MOVANTS’ SELECTION OF COUNSEL SHOULD BE APPROVED AS CO-LEAD COUNSEL

The Bhat Movants request that in the event they are appointed co-lead plaintiff, their counsel, Levi & Korsinsky, be appointed co-lead counsel with the proposed lead counsel for the Retirement Plan, Robbins Geller Rudman & Dowd LLP (“Robbins Geller”). Levi & Korsinsky has worked with Robbins Geller extensively in the past and is confident that the two firms could work together to effectively serve the interests of the class as co-lead counsel. In addition, the Bhat Movants request that their local counsel, SFMS, be appointed as co-liaison counsel with local counsel for the Retirement Plan.

1       **III. CONCLUSION**

2           As set forth above, the Bhat Movants respectfully request that the Court  
3 appoint them co-lead plaintiff of the instant action, and the law firm of Levi &  
4 Korsinsky be appointed co-lead counsel for the class and the law firm of SFMS be  
5 appointed co-liaison counsel for the class.

6  
7 Dated: April 12, 2016

Respectfully submitted,

8  
9                               **SHEPHERD FINKELMAN  
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